No. 16008

United States Court of Appeals

for the Ninth Circuit

SKOKOMISH INDIAN TRIBE, *Appellant*

vs.

E. L. FRANCE, TRUSTEE, *et al.*, *Appellees*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

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SKOKOMISH INDIAN TRIBE, *Appellant* *vs.* E. L. FRANCE, TRUSTEE, *et al.*, *Appellees*	Docket No. 16008

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

REPLY BRIEF OF APPELLANT SKOKOMISH INDIAN TRIBE

In this reply brief we will restrict ourselves to a discussion of the question of federal jurisdiction and to a reply to such matters raised in the answering briefs of the United States, the State of Washington and the individual appellees as are not concerned with the jurisdictional question and are in issue on this appeal.

I. THE DISTRICT COURT HAS JURISDICTION OF THIS CASE

As stated in appellant's opening brief, jurisdiction is based on U.S.C. Title 28, §§1331 and 1345. We will confine ourselves at this time to a discussion of the impact of U.S.C. Title 28, §1331. We quote that brief section in full:

> "Section 1331. *Federal question; amount in controversy.*
>
> The district courts shall have original juris-

diction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States. June 25, 1948, c.646, 62 Stat. 930."

The statute was amended on July 25, 1958, to increase the jurisdictional amount to $10,000. It is set out here as it existed at the time of the commencement of this action.

A. A FEDERAL QUESTION IS INVOLVED BECAUSE THE CASE TURNS ON THE INTERPRETATION OF A TREATY OF THE UNITED STATES.

We believe that the central question involved in this action is whether the treaty with the S'klallam Indians and with the Skokomish Tribe creating the Skokomish Indian Reservation [12 U.S. Stat. at Large 933; ratified and proclaimed 1859] is to be interpreted as including the lands here in controversy or not. If this treaty is to be given one construction then the rights asserted by the Skokomish Indian Tribe will be sustained. If it is to be given an opposite construction, the rights claimed will be defeated. This is the basis for deciding whether or not a federal question is involved. *Gully v. First National Bank*, 299 U.S. 109, 81 L.Ed 70. This is certainly the rule recognized in the cases cited by appellees themselves. *Martinez v. Southern Ute Tribe of Southern Ute Reservation*, 249 F.(2d) 915 (1957); *Phelps v. Hanson*, 163 F.(2d) 973 (1947); *Teeters v. Henton*, 43 F.(2d) 175 (1930).

The issue of treaty construction involved must affirmatively appear in the allegations of plaintiff's complaint. It has never been denied that the allegations of the complaint set forth in full the treaty construction problem involved and that the allegations are made in good faith. [Transcript of Record, pages 5 to 8 incl.]

We reiterate that the initial consideration of all the problems of this case must start from a construction of the treaty of 1855; and that that treaty may not be ignored in considering whether a federal question is herein involved. Such a treaty between the United States and an Indian tribe is a part of the supreme law of the land and cannot be treated by the courts as inoperative—or reformed by them. *Osage Tribe of Indians v. United States*, 66 Ct. Cl. 64 (1928). Such a treaty creates a binding obligation upon the United States and cannot be impaired. See 25 U.S.C. §71, *Moore v. United States*, 157 F.(2d) 760.

Where lands have been reserved for the use and occupation of an Indian tribe under the terms of a treaty or statute, the tribe must be compensated if the lands are subsequently taken from them. *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 86 L.Ed. 1501 (1942); *Shoshone Tribe v. United States*, 299 U.S. 476, 81 L.Ed. 360, 57 Sup. Ct. 244.

In *Shulthis v. McDougall*, 225 U.S. 561, 56 L.Ed. 1205 (1912) no federal question was involved because

no controversy existed respecting the validity, construction or effect of the Constitution, a treaty, or a statute of the United States. The only thing shown was that the statutes involved were the source of the complainant's title or right, and the complaint did not make mention concerning a controversy respecting their construction or effect. This is exactly the opposite of the situation herein presented, where the treaty is set forth as the right under which appellant must fail or prevail, and not merely as a source of title.

In *Norton v. Larney*, 266 U.S. 511, 69 L.Ed. 413 (1925) a suit to quiet title involving Indian lands was challenged on the ground that no federal question was involved. The court pointed out that it appeared in the record that the suit arose under an act of Congress and the solution depended on the construction and effect of that act. The court states, in part:

> "It thus appears that the right set up by appellees would be defeated by the construction of the act as appellants contend, but would be supported by the opposite construction. The case, therefore, in fact, is one arising under a law of the United States within the meaning of §24, subd. 1, of the Judicial Code."

Indeed, the right of maintaining a suit arises pursuant to provisions of treaties with the Indian tribes. In fact, it has been held that when the right asserted is a federally-created right and a federal statute is invoked as the basis for the relief sought, then the district court has jurisdiction over the subject matter

and the parties. *Brown v. Stufflebean*, 187 F.(2d) 347 (1951); *Cohen, Federal Indian Law*, p. 329.

The construction of a similar treaty was involved in *United States v. Winans*, 198 U.S. 371, 25 Sup. Ct. 662 (1905). The court there states that the pivot of the controversy is the construction of the paragraph in the treaty which gave to the Yakima Indian Tribe the right of taking fish at all usual and accustomed places in common with the citizens of the territory. Because of the impact of that case we quote at length from it:

> "The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of right from them,—a reservation of those not granted. And the form of the instrument and its language was adapted to that purpose. Reservations were not of particular parcels of land, and could not be expressed in deeds, as dealings between private individuals. The reservations were in large areas of territory, and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein. * * * It is further contended that the rights conferred upon the Indians are subordinate to the powers acquired by the state upon its admission into the

> Union. In other words, it is contended that the state acquired by its admission into the Union 'upon an equal footing with the original states,' the power to grant rights in or to dispose of the shore lands upon navigable streams, and such power is subject only to the paramount authority of Congress with regard to public navigation and commerce. The United States, therefore, it is contended, could neither grant nor retain rights in the shore or to the lands under water.
>
> "The elements of this contention and the answer to it are expressed in *Shively v. Bowlby*, 152 U.S. 1, 38 L.Ed. 331, 14 Sup. Ct. Rep. 548. It is unnecessary, and it would be difficult, to add anything to the reasoning of that case. The power and rights of the states in and over shore lands were carefully defined, but the power of the United States, while it held the country as a territory, to create rights which would be binding on the states, was also announced, opposing the *dicta* scattered through the cases, which seemed to assert a contrary view. * * *"

Thus, contrary to the contention of appellees, the right of the Skokomish Tribe to the tidelands reserved to them is paramount to any right of the state. The state's right was acquired subject to the primary treaty rights of the Skokomish and when in conflict therewith the state must acknowledge the supreme right and submit. While this argument is addressed to the merits it points up the existence of a federal question, the discovery of which cannot be made without some inquiry into the subject matter of this action.

United States v. Ashton, 170 Fed. 509 (1909) is relied upon by the appellees. In that case the factual

situation was materially different than here exists in relation to the Skokomish reservation. In the *Ashton* case the reservation had been extinguished, while in the instant case the reservation remains in full existence and use. See *United States v. Taylor*, 33 F.(2d) 608, 614 (1929); *Montana Power Company v. Rochester*, 127 F(2d) 189, 191 (1942). This court found that a federal question was involved in the interpretation of these treaties in *Mcauley v. Makah Indian Tribe*, 128 F.(2d) 867 (1942). We submit that this case presents a federal question and that the Federal District Court has jurisdiction of its solution.

B. THE REQUIRED JURISDICTIONAL AMOUNT IS INVOLVED IN THIS CASE.

The action here brought is one to quiet title. The complaint sets forth the allegations that the tidelands in question were reserved to the plaintiff tribe under the treaty. The complaint also relates that the State of Washington has granted certain rights to the defendants named in the complaint, or their predecessors in interest. Thus we find that the titles or claims of the defendants have a common source.

In *Peterson v. Sucro*, 93 F.(2d) 878 (1938) the court stated as follows:

> "A plaintiff cannot, of course, invoke the federal jurisdiction where the requisite jurisdictional amount must be obtained by joining in one action separate claims against two or more defendants. [citing cases]. But ordinarily in suits

> to quiet title or actions in ejectment, the amount in controversy is the value of the whole of the real estate to which the claim extends and not the value of defendant's claim." [citing cases].

In *Cornell v. Mabe*, 206 F.(2d) 514 (1953) a quiet title action was brought against 49 individuals who owned record title to lots derived from one common owner. In considering the motion to dismiss on the basis that the matter in controversy as to each defendant did not exceed the jurisdictional amount the court stated:

> "It is true that where a suit is brought against several defendants asserting claims against each of them which are separate and distinct, the test of jurisdiction is the amount of each claim, and not their aggregate. However, when the action is to recover a single tract of land and the several defendants claim under a common source of title, the matter in controversy is the entire tract of land and not its several parts. The trial court properly overruled the defendants' plea to its jurisdiction."

All of the appellees who claim title to the land assert the common defense that the tidelands were not vested in the Skokomish Indian Tribe by virtue of the treaty of 1855. The allegations of the complaint make it plain that a common issue is raised as to all defendants and that a common source of title is involved.

It is the general rule, where several plaintiffs unite to enforce a single title or right in which they have a common undivided interest, that a jurisdictional amount is met when the interests collectively

total the requisite sum. *Century Insurance Company v. Mooney*, 241 F.(2d) 910 (1957); *Bateman v. Southern Ore Company*, 217 Fed. 933. We think the analogy holds true that here there is a single title or right of the Skokomish Tribe flowing from its treaty, the values of each of the tracts involved may be aggregated to reach the jurisdictional amount.

That sufficient value is involved was obvious to the district judge initially confronted with the problem and his statement in the memorandum opinion is well founded. (Transcript of Record, page 49). The Congress has seen fit to require a minimum sum to be in issue before federal jurisdiction lies in order to channel petty contest elsewhere, relieve the federal courts of unimportant matters, and define a manageable workload for the federal system. Certainly the sum involved here exceeds the jurisdictional minimum, the cause cannot be considered unimportant, and a consideration of its merits will not thwart the Congressional purpose.

The foregoing is in reply to the contentions of the United States, the State of Washington, and the private appellees, each of whom challenges the jurisdiction of the Federal Courts to hear this cause.

II. REPLY TO UNITED STATES: THE UNITED STATES IS A NECESSARY, BUT NOT AN INDISPENSABLE PARTY TO THIS ACTION.

The United States contends that under *Choctaw*

and Chickasaw Nations v. Seitz, 193 F.(2d) 456 (1951), the United States cannot be joined herein even though a necessary party, since it has not consented to be sued. Our interpretation of that case differs from that of the United States. We submit that the *Seitz* case stands for the proposition that permission to sue may be conferred by *implication* by statute, but that if such an implication cannot be fairly drawn from the statute, consent is lacking. We submit that an examination of the treaty with the S'klallams entered into in 1855 [12 U.S. Stat. at Large 933] in the light of our government's historical relationship with Indian tribes pursuant to such treaties as discussed at pages 7 to 29 of our opening brief, discloses that the United States has assumed obligations and entered upon a relationship which implies consent to be sued in a matter such as this, particularly where no claim adverse to the United States is asserted.

We contended in our opening brief that the United States is not an indispensable party and are glad to note that the government concurs in this position and urges reversal insofar as the District Court held the United States to be an indispensable party. (Brief for the United States, pages 6-7). We submit that it should be held to be a necessary party, within the rule of the *Seitz* case and the cases following it, and should be joined as such in view of the treaty here in issue and the obligations assumed thereby, from which con-

sent to assume its responsibility as guardian of its Indian wards can be implied. But in any event, since the United States is not an indispensable party, the case may proceed without its being joined and it was error to dismiss the action as to the other defendants. *Choctaw and Chickasaw Nations v. Seitz, supra; United States v. Candelaria,* 271 U.S. 432, 70 L.Ed. 1023 (1926).

In other words, appellant is not here seeking to assert any interest adverse to the United States and asks for no relief against it. The tribe merely seeks to call the United States to a performance of its obligations, asking the government's assistance in the preservation of its treaty rights—and originally did so, in fact, at the suggestion of the District Judge. (Transcript of the Record, Pages 122 to 124). If the United States, acting through the Attorney General, declines to accept its responsibilities and insists upon its immunity to suit, it may be—contrary to our contentions above—that neither appellant nor the court can compel the United States to appear. Appellant agrees that if that is the outcome, the United States will not be bound by a judgment in this proceeding, but that was also true in the *Candelaria* and *Seitz* cases, *supra.* Having tendered the case to the United States, however, it is clear, under those cases, that appellant is entitled to proceed against the other appellees even though the United States is not a party.

III. REPLY TO APPELLEE STATE OF WASHINGTON: THE STATE HAS CONSENTED TO BE SUED.

Counsel for the State of Washington have urged at some length their very broad views with respect to the state's immunity from suit. At page 15 of their brief they state their position in its most extreme form by claiming "immunity from suit in any court"—a statement which is unsound on its face. They make only passing reference to Section 194, c.255, Laws of 1927, RCW 79.01.736 (formerly RCW 79.08.020). At page 17 it is stated that this statute "does not waive the state's immunity from suit nor authorize any state officer to do so."

This section was part of an extensive statute dealing with the public lands of the state, specifically including tidelands. Section 194 not only authorizes the Attorney General to defend actions to which the state may be a party in any court of the United States but imposes the duty upon him to do so. Clearly the legislature did not intend the enactment of this provision to be a useless act. The legislature is empowered to permit the state to be sued. By this provision it has recognized the state's suability in the federal courts and by the clearest possible inference has consented thereto. It would certainly be presumptuous to suggest that the legislature intended to direct the Attorney General to defend suits in courts in which

it had not, in so doing, consented that the state might be sued.

The cases cited by counsel for the state at pages 16 to 18 of the brief are not in point here because none of them involved a statute similar to RCW 79.01.736. The Attorney General appeared in this case, involving a subject matter with respect to which he is authorized to represent the state and before a court clearly contemplated by the legislature. The state has consented to be sued in the District Court in matters of this kind.

In like manner, counsel for the state make little mention in its brief of the provisions of the Organic Act creating the territorial government of Washington [10 U.S. Stat. at Large, c.90 p. 172], wherein it is provided that the United States shall be free to make any regulation respecting the Indians of the territory, their lands, property or other rights by treaty, law or otherwise, which the United States would have been competent to make in the first instance; nor do they discuss the consent to be sued which was required of it by Section 4 of the Enabling Act creating the state [25 U.S. Stat. at Large, c.180 p. 676]. Similarly, no discussion is offered of the provisions of Art. XXVI of the Washington State Constitution which complies with the requirements of the Enabling Act, disclaiming all right to lands held by the Indian tribes and consenting to the jurisdiction of

the United States over said lands. For the convenience of the court we set Art. XXVI of the Washington State Constitution forth in the appendix. The passage of time has not impaired the full force of this binding consent of the citizens of the State of Washington to suit in federal court in cases such as this, where tribal lands are concerned. The force of a treaty overrides state statutes and must be regarded as a part of an individual state's own law. It may override the power of the state even in respect to a great breadth of private relationships which usually fall within the control of the state. *Amaya v Stanolind Oil & Gas Co.*, 158 F.(2d) 554. While it is true that before statehood the United States held title to all land now within the boundaries of the state in trust for the future state, it nevertheless is also true that the power existed in the United States to patent lands and to set certain lands aside by treaty to the Indian tribes. The state recognized, and indeed was forced to recognize, such prior conveyances and to disclaim all title to such land as a condition of statehood. *Mercer Island Beach Club v. Pugh*, 153 Wn. Dec 421 (1959); *Narrows Realty Company, Inc. v. State*, 152 Wn. Dec. 788 (1958). The citizens of the State of Washington consented to suit for the protection of these tribal lands in consideration of the granting of statehood, and the passage of time has not lessened the binding quality of this consent or the obligation of the state to recognize it.

The exigencies of the present are a poor excuse for the breach of treaty commitments once honored as sacred. Blumenthal, *American Indians Dispossessed*, Pg. 167.

CONCLUSION

We submit that the proper decision of this case must be one based upon the specific relationship between the Skokomish Indian Tribe, growing out of its treaty with the United States, and the appellees herein. Arguments involving relationships which are not parallel to the instant case and which overlook the fact that the treaty with the S'klallams, the Organic Act, the Enabling Act and the Washington State Constitutional provision stand on as firm a foundation as they did at the time of their execution, are necessarily fallacious. We submit that the jurisdiction of the federal court is firmly established. We submit further, that the United States is a necessary party and, for convenience and good conscience, should be brought into this action; but we concede that it is not an indispensable party and urge most strongly that, in any event, the case can proceed without it.

The State of Washington consented, as a condition to statehood, to the imposition of obligations in favor of the Indians in connection with their lands which must necessarily be triable in the federal courts, all jurisdiction having been reserved to the United States.

Similarly, the state has expressly recognized by statute that it may be sued in the federal courts and has authorized and directed its Attorney General to appear therein—as he has done in this case. In any event, as with respect to the United States, dismissal of the state does not prevent proceeding as against the private defendants.

As to the individual and corporate defendents, no real reason for dismissing the action has been suggested. They enjoy no immunity from suit, and the appellant's dispute with them clearly arises under its treaty with the United States and involves more than $3,000.00. Under the Enabling Act and the State Constitution jurisdiction over the lands here involved has been reserved to the United States. Even if it be held that the District Court does not have jurisdiction of the United States and the state, it clearly has jurisdiction of the other parties and should proceed as to them.

We respectfully submit that the Order of Dismissal of the Distrcit Court should be reversed and the District Court instructed to proceed to trial upon the merits of the case.

Respectfully submitted,

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APPENDIX

Washington State Constitution

Article XXVI COMPACT WITH THE UNITED STATES

" * * * Second. That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States and that the lands belonging to citizens of the United States residing without the limits of this state shall never be taxed at a higher rate than the lands belonging to residents thereof; and that no taxes shall be imposed by the state on lands or property therein, belonging to or which may be hereafter purchased by the United States or reserved for use: *Provided*, That nothing in this ordinance shall preclude the state from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of congress containing a provision exempting the lands thus granted from taxation, which exemption shall continue so long and to such an extent as such act of congress may prescribe. * * * "